SWOP4G

SOUTHWEST OHIO
PURCHASING FOR
GOVERNMENT

INITIATING A PERFORMANCE CLAIM

By: David A. Kotnik, Esq.

DAVID A. KOTNIK, ESQ.

ONE PARK CIRCLE • WESTFIELD CENTER, OHIO 44251
330.887.6351 • davidkotnik@westfieldgrp.com

EXPERIENCE

Westfield Group — Westfield Center, Ohio
Bond Claims Counsel — May 2009 to Present

- Analyze and resolve contract surety bond claims, while maximizing recovery through indemnity and/or contract proceeds.
- Manage legal activity related to disputed claims, principal defaults and subrogation efforts.
- Serve as the surety's representative at trials, arbitrations, mediations and mandatory settlement conferences.
- Secure completion contractors upon principal default and monitor both principal and completion contractor performance.

Frantz Ward LLP — Cleveland, Ohio
Litigation Attorney, Construction — May 2007 to May 2009

- Concentration in litigation of construction disputes, including prosecuting contractor claims against owners (public and private sector) and subcontractors, defending contractors against owner and subcontractor claims, and defending contractors against tort-based claims (including employer intentional torts).
- First-chaired arbitrations before the American Arbitration Association.
- Research and analyze legal issues and draft related memoranda, pleadings, motions and briefs.
- Conduct all aspects of discovery, including depositions.

Roetzel & Andress, L.P.A. — Cleveland, Ohio
Litigation Attorney, Construction/Real Estate — June 2005 to May 2007

- Concentration in litigation of construction, real estate and commercial disputes.
- Researched and analyzed legal issues and drafted related memoranda, pleadings, motions and briefs.
- Conducted all aspects of discovery, including depositions.
- Reviewed and drafted owner/contractor agreements and contractor/subcontractor agreements.

Joseph W. Diemert, Jr. & Associates Co., L.P.A. — Cleveland, Ohio
Law Clerk, General Practice — January 2005 to June 2005

- Researched and analyzed municipal law issues and drafted related memoranda, pleadings, motions and briefs.
- Conducted client interviews and assisted in preparing clients for court appearances.

Contract Operations Planning, LLC — Cleveland, Ohio
Claim Analyst, Contract Surety Bond Division — January 1999 to December 2003

- Analyzed and resolved contract surety bond claims, while maximizing recovery through indemnity and/or contract proceeds.
- Managed legal activity related to disputed claims, principal defaults and subrogation efforts.
- Served as the surety's representative at trials, arbitrations, mediations and mandatory settlement conferences.
- Secured completion contractors upon principal default and monitored both principal and completion contractor performance.
- Performed legal research and maintained state and federal statutory compilations related to surety bond claims.
- Responsible for the administration of a loss portfolio transfer, including the management of all claim activity and preparation of Large Loss Reports for the surety and its reinsurers.

EDUCATION

J.D., December 2004
Cleveland-Marshall College of Law, Cleveland State University, Cleveland, Ohio

- Member – Ohio State Bar Association, Cleveland Bar Association, Commercial Law League of America
- Dean's List

B.S., Production & Operations Management/International Business, December 1992
The Ohio State University, Columbus, Ohio

- Member – American Production & Inventory Control Society

ASSOCIATIONS

Member – American Bar Association, Ohio State Bar Association, Cleveland Metropolitan Bar Association, American Institute of Constructors

Westfield Insurance Company
Westfield Center, Ohio 44251-5001

Bond No.

AIA Document A312

Performance Bond

Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.

CONTRACTOR (Name and Address):

SURETY (Name and Principal Place of Business):
Westfield Insurance Company
1 Park Circle PO Box 5001 Westfield Center, Ohio 44251-5001

OWNER (Name and Address):

CONSTRUCTION CONTRACT
Date:
Amount:
Description (Name and Location):

BOND
Date (Not earlier than Construction Contract Date):
Amount:
Modifications to this Bond: ☐ None ☐ See Page 3

CONTRACTOR AS PRINCIPAL
Company: ______________________ (Corporate Seal)

SURETY
Company: **Westfield Insurance Company** (Corporate Seal)

Signature: ______________________
Name and Title:

Signature: ______________________
Name and Title:

(Any additional signatures appear on page 3)

(FOR INFORMATION ONLY – Name, Address and Telephone)
AGENT or BROKER:

Owner's Representative (Architect, Engineer or other party):

2

1 The Contractor and the Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.

2 If the Contractor performs the Construction Contract, the Surety and the Contractor shall have no obligation under this Bond, except to participate in conferences as provided in Subparagraph 3.1.

3 If there is no Owner Default, the Surety's obligation under this Bond shall arise after:

3.1 The Owner has notified the Contractor and the Surety at its address described in Paragraph 10 below that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default; and

3.2 The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the contract. Such Contractor Default shall not be declared earlier than twenty days after the Contractor and the Surety have received notice as provided in Subparagraph 3.1; and

3.3 The Owner has agreed to pay the Balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract or to a contractor selected to perform the Construction Contract in accordance with the terms of the contract with the Owner.

4 When the Owner has satisfied the conditions of Paragraph 3, the Surety shall promptly and at the Surety's expense take one of the following actions:

4.1 Arrange for the Contractor, with consent of the Owner, to perform and complete the Construction Contract; or

4.2 Undertake to perform and complete the Construction Contract itself, through its agents or through independent contractors; or

4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and the contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Paragraph 6 in excess of the Balance of the Contract Price incurred by the Owner resulting from the Contractor's default; or

4.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:

.1 After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, tender payment therefor to the Owner; or

.2 Deny liability in whole or in part and notify the Owner citing reasons therefor.

5 If the Surety does not proceed as provided in Paragraph 4 with reasonable promptness, the Surety shall be deemed to be in default on this Bond fifteen days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, and the Owner shall be entitled to enforce any remedy available to the Owner. If the Surety proceeds as provided in Subparagraph 4.4, and the Owner refuses the payment tendered or the Surety has denied liability, in whole or in part, without further notice the Owner shall be entitled to enforce any remedy available to the Owner.

6 After the Owner has terminated the Contractor's right to complete the Construction Contract, and if the Surety elects to act under Subparagraph 4.1, 4.2, or 4.3 above, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract. To the limit of the amount of this Bond, but subject to commitment by the Owner of the Balance of the Contract Price to mitigation of costs and damages on the Construction Contract, the Surety is obligated without duplication for:

6.1 The responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;

6.2 Additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Paragraph 4; and

6.3 Liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or nonperformance of the Contractor.

7 The Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than the Owner or its heirs, executors, administrators or successors.

8 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.

9 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

10 Notice to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the signature page.

11 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. The intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

12 DEFINITIONS

12.1 Balance of the Contract Price: The total amount payable by the Owner to the Contractor under the Construction Contract after all proper adjustments have been made, including allowance to the Contractor of any amounts received or to be received by the Owner in settlement of insurance or other claims for damages to which the Contractor is entitled, reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract.

12.2 Construction Contract: The agreement between the Owner and the Contractor identified on the signature page, including all Contract Documents and changes thereto.

12.3 Contractor Default: Failure of the Contractor, which has neither been remedied nor waived, to perform or otherwise to comply with the terms of the Construction Contract.

12.4 Owner Default: Failure of the Owner, which has neither been remedied nor waived, to pay the Contractor as required by the Construction Contract or to perform and complete or comply with the other terms thereof.

MODIFICATIONS TO THIS BOND ARE AS FOLLOWS:

(Space is provided below for additional signatures of added parties, other than those appearing on the cover page.)

CONTRACTOR AS PRINCIPAL

Company: (Corporate Seal)

Signature: ______________________

Name and Title:

Address:

SURETY

Company: (Corporate Seal)

Signature: ______________________

Name and Title:

Address

BD 5971 (07-2003)

PERFORMANCE BOND

Any singular reference to Contractor, Surety, Owner, or other party shall be considered plural where applicable.

CONTRACTOR (*Name and Address*):

SURETY
(*Name, and Address of Principal Place of Business*):

OWNER (*Name and Address*):

CONTRACT
Effective Date of Agreement:

BOND
Bond Number:

Surety and Contractor, intending to be legally bound hereby, subject to the terms printed on reverse side hereof, do each cause this Performance Bond to be duly executed by an authorized officer, agent, or representative.

CONTRACTOR AS PRINCIPAL

______________________ (Seal)
Contractor's Name and Corporate Seal

By: ______________________
Signature

____
Print Name

____
Title

Attest: ______________________
Signature

____
Title

SURETY

______________________ (Seal)
Surety's Name and Corporate Seal

By: ______________________
Signature (Attach Power of Attorney)

____
Print Name

____
Title

Attest: ______________________
Signature

Title

OWNER APPROVAL

Note: Provide execution by additional parties, such as joint venturers, if necess--

04/17/09

2 Sided Original

Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors, and assigns to Owner for the performance of the Contract, which is incorporated herein by reference.

1. If Contractor performs the Contract, Surety and Contractor have no obligation under this Bond, except to participate in conferences as provided in Paragraph 2.1.

2. If there is no Owner Default, Surety's obligation under this Bond shall arise after:

2.1 Owner has notified Contractor and Surety, at the addresses described in Paragraph 9 below, that Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with Contractor and Surety to be held not later than 15 days after receipt of such notice to discuss methods of performing the Contract. If Owner, Contractor, and Surety agree, Contractor shall be allowed a reasonable time to perform the Contract, but such an agreement shall not waive Owner's right, if any, subsequently to declare a Contractor Default; and

2.2 Owner has declared a Contractor Default and formally terminated Contractor's right to complete the Contract. Such Contractor Default shall not be declared earlier than 20 days after Contractor and Surety have received notice as provided in Paragraph 2.1; and

2.3 Owner has agreed to pay the Balance of the Contract Price to:

1. Surety in accordance with the terms of the Contract; or
2. Another contractor selected pursuant to Paragraph 3.3 to perform the Contract.

3. When Owner has satisfied the conditions of Paragraph 2, Surety shall promptly, and at Surety's expense, take one of the following actions:

3.1 Arrange for Contractor, with consent of Owner, to perform and complete the Contract; or

3.2 Undertake to perform and complete the Contract itself, through its agents or through independent contractors; or

3.3 Obtain bids or negotiated proposals from qualified contractors acceptable to Owner for a contract for performance and completion of the Contract, arrange for a contract to be prepared for execution by Owner and contractor selected with Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Contract, and pay to Owner the amount of damages as described in Paragraph 5 in excess of the Balance of the Contract Price incurred by Owner resulting from Contractor Default; or

3.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor, and with reasonable promptness under the circumstances:

1. After investigation, determine the amount for which it may be liable to Owner and, as soon as practicable after the amount is determined, tender payment therefor to Owner; or

2. Deny liability in whole or in part and notify Owner citing reasons therefor.

4. If Surety does not proceed as provided in Paragraph 3 with reasonable promptness, Surety shall be deemed to be in default on this Bond 15 days after receipt of an additional written notice from Owner to Surety demanding that Surety perform its obligations under this Bond, and Owner shall be entitled to enforce any remedy available to Owner. If Surety proceeds as provided in Paragraph 3.4, and Owner refuses the payment tendered or Surety has denied liability, in whole or in part, without further notice Owner shall be entitled to enforce any remedy available to Owner.

5. After Owner has terminated Contractor's right to complete the Contract, and if Surety elects to act under Paragraph 3.1, 3.2, or 3.3 above, then the responsibilities of Surety to Owner shall not be greater than those of Contractor under the Contract, and the responsibilities of Owner to Surety shall not be greater than those of Owner under the Contract. To the limit of the amount of this Bond, but subject to commitment by Owner of the Balance of the Contract Price to mitigation of costs and damages on the Contract, Surety is obligated without duplication for:

5.1 The responsibilities of Contractor for correction of defective Work and completion of the Contract;

5.2 Additional legal, design professional, and delay costs resulting from Contractor's Default, and resulting from the actions of or failure to act of Surety under Paragraph 3; and

5.3 Liquidated damages, or if no liquidated damages are specified in the Contract, actual damages caused by delayed performance or non-performance of Contractor.

6. Surety shall not be liable to Owner or others for obligations of Contractor that are unrelated to the Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than Owner or its heirs, executors, administrators, or successors.

7. Surety hereby waives notice of any change, including changes of time, to Contract or to related subcontracts, purchase orders, and other obligations.

8. Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the Work or part of the Work is located, and shall be instituted within two years after Contractor Default or within two years after Contractor ceased working or within two years after Surety refuses or fails to perform its obligations under this Bond, whichever occurs first. If the provisions of this paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

9. Notice to Surety, Owner, or Contractor shall be mailed or delivered to the address shown on the signature page.

10. When this Bond has been furnished to comply with a statutory requirement in the location where the Contract was to be performed, any provision in this Bond conflicting with said statutory requirement shall be deemed deleted herefrom and provisions conforming to such statutory requirement shall be deemed incorporated herein. The intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

11. Definitions.

11.1 Balance of the Contract Price: The total amount payable by Owner to Contractor under the Contract after all proper adjustments have been made, including allowance to Contractor of any amounts received or to be received by Owner in settlement of insurance or other Claims for damages to which Contractor is entitled, reduced by all valid and proper payments made to or on behalf of Contractor under the Contract.

11.2 Contract: The agreement between Owner and Contractor identified on the signature page, including all Contract Documents and changes thereto.

11.3 Contractor Default: Failure of Contractor, which has neither been remedied nor waived, to perform or otherwise to comply with the terms of the Contract.

11.4 Owner Default: Failure of Owner, which has neither been remedied nor waived, to pay Contractor as required by the Contract or to perform and complete or otherwise comply with the other terms thereof.

(FOR INFORMATION ONLY - Name) AGENT or BROKER:	OWNER'S REPRESENTATIVE: Ruekert & Mielke, Inc.,

Bid Guaranty and Contract Bond

(Section 153.571 and 3929.121 Ohio Revised Code)

WESTFIELD GROUP™

Westfield Center, Ohio 44251-5001

"KNOW ALL PERSONS BY THESE PRESENTS, that we, the undersigned ______________________________

as principal and **Ohio Farmers Insurance Co.** as sureties, are hereby held and firmly bound unto ______________________________

as obligee in the penal sum of the dollar amount of the bid submitted by the principal to the obligee on ______________________ to undertake the project known as ______________________________. The penal sum referred to herein shall be the dollar amount of the principal's bid to the obligee, incorporating any additive or deductive alternate bids made by the principal on the date referred to above to the obligee, which are accepted by the obligee. In no case shall the penal sum exceed the amount of ______________________________ dollars. (If the foregoing blank is not filled in, the penal sum will be the full amount of the principal's bid, including alternates. Alternatively, if the blank is filled in, the amount stated must not be less than the full amount of the bid including alternates, in dollars and cents. A percentage is not acceptable.) For the payment of the penal sum well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors, administrator, successors, and assigns.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that whereas the above named principal has submitted a bid for ______________________________.

Now, therefore, if the obligee accepts the bid of the principal and the principal fails to enter into a proper contract in accordance with the bid, plans, details, specifications, and bills of material; and in the event the principal pays to the obligee the difference not to exceed ten per cent of the penalty hereof between the amount specified in the bid and such larger amount for which the obligee may in good faith contract with the next lowest bidder to perform the work covered by the bid; or in the event the obligee does not award the contract to the next lowest bidder and resubmits the project for bidding, the principal pays to the obligee the difference not to exceed ten per cent of the penalty hereof between the amount specified in the bid, or the costs, in connection with the resubmission, of printing new contract documents, required advertising, and printing and mailing notices to prospective bidders, whichever is less, then this obligation shall be null and void, otherwise to remain in full force and effect; if the obligee accepts the bid of the principal and the principal within ten days after the awarding of the contract enters into a proper contract in accordance with the bid, plans, details, specifications, and bills of material, which said contract is made a part of this bond the same as though set forth herein;

Now also, if the said ______________________________

shall well and faithfully do and perform the things agreed by ______________________________

to be done and performed according to the terms of said contract; and shall pay all lawful claims of subcontractors, materials suppliers, and laborers, for labor performed and materials furnished in the carrying forward, performing, or completing of said contract; we agreeing and assenting that this undertaking shall be for the benefit of any materials suppliers or laborer having a just claim, as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

The said surety hereby stipulates and agrees that no modifications, omission, or additions, in or to the terms of the said contract or in or to the plans or specifications therefor shall in any wise affect the obligations of said surety on its bond."

Signed this ____________ day ____________, ______.

PRINCIPAL: ______________________
BY: ______________________
TITLE: ______________________
SURETY: OHIO FARMERS INSURANCE CO.
BY: ______________________
, Attorney-in-fact

SURETY COMPANY ADDRESS:
BOND DEPARTMENT
OHIO FARMERS INSURANCE CO.
P. O. BOX 5001, 1 PARK CIRCLE
WESTFIELD CENTER, OHIO 44251-5001

SURETY AGENT'S ADDRESS:
AGENCY NAME: ______________________
STREET: ______________________
CITY, STATE, ZIP: ______________________

BD 5965 OF (11-01)